IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 743 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ARVIND RAMJIBHAI MARU & ANR.

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA for the Appellants.

MR ST MEHTA, APP for the Respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI
Date of decision: 13/12/96

ORAL JUDGEMENT (per Kadri, J.)

By means of filing this appeal under S. 374(2) of the Code of Criminal Procedure, 1973, the appellants

who are the original accused have questioned legality and validity of the judgment and order dated September 21, 1989, rendered by the learned Sessions Judge, Valsad at Navsari, in Sessions Case No. 9 of 1988, whereby the learned Sessions Judge convicted appellant no.1 under S.302 of I.P.Code, whereas appellant no.2 was convicted under S.302 read with S.114 of I.P.Code and sentenced both of them to under go R.I for life.

2. Brief facts of the case as unfolded at the trial are as under :

Deceased Keshav Mala was residing at Gaekward-ni Chawl, alongwith his wife Naniben, two daughters Hansa and Ganga and one son Himmat. Kankuben, sister of the deceased and Ramesh brother of the deceased, as well as the appellants also resided in the said chawl. Previously the deceased was working in Gaekwad Mill but after its closure, since last two years prior to the incident, he was jobless. His wife Naniben was selling vegetables at Surat and Billimora. The deceased had gone to Mumbai for some social work relating to divorce of his niece Geeta and had returned to Billimora on 6.10.1987 in the early morning around 5.0 a.m. Naniben had gone to Surat on that day and had returned to Billimora around 2.30 p.m. On the day of incident, i.e. 6.10.1987, around 4.30 p.m., the deceased asked his wife Naniben to prepare tea, and after taking tea the deceased went to the public lavatory situated near Gaekwad mill, to answer call of nature by taking a plastic tumbler with him. Himmat, the son of the deceased was playing with other boys near the chawl. Naniben called Himmat and gave him money to buy oil. Himmat went to the market to buy oil. While he was proceeding towards market, he saw that the two appellants had hidden themselves near the wall situated behind the lavatories. Himmat saw that his father was coming out of the lavatory, and as he came out from the lavatory, accused no.2 came from behind and caught hold of both the hands of the deceased and appellant no.1 inflicted knife blow on the abdominal part of the deceased. Because of the knife blow inflicted by the accused, there was profuse bleeding from the wound sustained by the deceased. Himmat raised shouts. Therefore, the appellants ran away from the place of incident. On hearing shouts of Himmat, Naniben and her sister-in-law Kankuben came running towards the lavatory. As a result of the abdominal injury sustained by the deceased, there was profuse bleeding and therefore, the sister-in-law of Naniben, viz. Kankuben gave her sari which was tied around the wound. Because of the hubbub, other persons residing in the locality gathered there. Ramesh Malji, brother of the deceased and one Jagubhai also came near

the place of incident. It is the prosecution case that because of the injury, the deceased had fallen down, and was conscious, and on being asked as to what had happened, he made an oral dying declaration before his relatives that accused no.1 had inflicted knife injury to him. Himmat was asked to bring an autorickshaw to take the deceased to the hospital. Within a couple of minutes, Himmat brought autorickshaw in which the deceased was taken to hospital. Naniben and Kankuben accompanied the deceased to Mangusi hospital at Billimora where he was examined and treated by Dr.Dalal. During treatment, the deceased succumbed to the injury and was declared dead. Dr.Dalal, who was the Medical Officer of Mangusi Hospital telephoned Billimora Police Station and informed about death of the deceased, and accordingly, police had come to interrogate the relatives of the deceased. As per the prosecution case, after death of the deceased, Naniben lodged her complaint against the appellants before PSI Mr.Oza at the police station. PSI Oza after recording complaint of Naniben recorded statements of Kankuben, Jagubhai, Ramesh and Himmat. He held the inquest on the dead body of the deceased and sent it for postmortem examination. Postmortem examination of the dead body was performed by Dr.Dalal. PSI Oza, went to the scene of offence and collected bloodstained soil as well as control soil and prepared the panchnama of the scene of offence. Yadi was sent to the Circle Inspector to prepare the map of the scene of offence. Search for the appellants was made by PSI Oza, but it was learnt by him that they had gone to Surat and Navsari, and therefore, PSI Oza went to Navsari and arrested appellant no.1 around 2.0 a.m. and the arrest panchnama was made. Bloodstained bush-shirt was also seized from appellant no.1. Appellant no.2 was arrested at Surat from the house of his father-in-law around 4.0 a.m., and accordingly the arrest panchnama was prepared. Appellant no.1 expressed his willingness to produce the knife which was used in the commission of offence and therefore, two panchas were called and muddamal knife was discovered under panchnama prepared under S.27 of the Indian Evidence Act. The soil collected from the scene of offence, knife and other articles were sent to the Forensic Science Laboratory for examination and report. After recording the statements of other witnesses and after obtaining the postmortem notes and report of the Forensic Science Laboratory, PSI Oza submitted charge-sheet against both the appellants for the offence under S.302 read with S.114 of I.P.Code, in the Court of the learned Judicial Magistrate First Class at Billimora. As the offence under S. 302 of I.P.Code is exclusively triable by Court of Sessions, the learned Magistrate

committed the case to the Sessions Court at Navsari, which was numbered as Sessions Case No. 9 of 1988.

3. Charge Ex.1 was framed against both the appellants for offence under S. 302 read with S. 114 of I.P.code. The charge was read over and explained to the appellants. The appellants pleaded not guilty to the charge and claimed to be tried.

4. In order to prove its case against the appellants, the prosecution examined following witnesses:

PW 1 Ex. 14 Informant Naniben, Wd/o.Keshavbhai
PW 2 Ex. 16 Kankuben Dineshbhai,
PW 3 Ex. 17 Himmatbhai Keshavbhai, son of the deceased.
PW 4 Ex. 18 Dr.Dilip Ishwarlal Dalal,
PW 5 Ex. 19 Jagubhai Nathubhai,
PW 6 Ex. 20 Ranabhai Devabhai,
PW 7 Ex. 24 Chhaganbhai Durlabhbhai,
PW 8 Ex. 26 Ramesh Maljibhai,
PW 9 Ex. 29 Kunverjibhai Jagabhai,
PW 10 Ex. 31 Bharat Ballubhai,
PW 11 Ex. 32 Kanji Chhagan,
PW 12 Ex. 33 Samatsing Chhanabhai,
PW 13 Ex. 35 Bhikhaji Devram,
PW 14 Ex. 36 PSI Vrajkhan Govind Oza,

In support of its case, the prosecution produced various documentary evidence such as inquest panchnama, panchnama of the scene of offence, postmortem, notes, complaint, arrest panchnamas, map of the scene of offence, report of FSL, etc.

5. After recording of the prosecution evidence was over, the appellants were question generally on the incriminating evidence appearing against them on the record of the case and their statements came to be recorded under S. 313 of the Code of Criminal Procedure. The defence of the appellants was of denial and they stated that they were falsely involved in the case.

6. After appreciating the oral as well as documentary evidence led by the prosecution and after hearing the arguments of the learned Advocates appearing for both the sides, learned Sessions Judge recorded the following conclusions :

(i) Oral evidence of Dr.Dalal of Mangusi Hospital and the postmortem notes Ex.11 prove that Keshavbhai Malabhai died a homicidal death.

(ii) It is proved that murderous assault was made near the lavatory shown in the panchnama of the scene of offence, Ex.21

(iii) Oral evidence of PW 3 Himmat proves beyond doubt that he was present near the place of incident when the appellants had attacked the deceased near the lavatory.

(iv) Oral evidence of Naniben, Kankuben, Jagubhai and Rameshbhai and the complaint Ex.15 prove beyond doubt that Himmat had witnessed the incident from a close distance.

(v) Oral evidence of Himmat is trustworthy and reliable and is corroborated by other prosecution witnesses.

(vi) PW 1 Naniben had seen both the appellants running away from the place where the deceased was lying in a bleeding condition.

(vii) Prosecution proved that the deceased had made oral declaration before PW 2 Kankuben, PW 5 Jagubhai and PW 8 Rameshbhai, wherein the names of the appellants were mentioned as the assailants.

(viii) Oral evidence of Police Head Constable Bhikhaji Devram and PSI Oza, proves beyond doubt that PW 1 Naniben had lodged FIR Ex. 15 at 19.0 hours on 6.10.1987 at Billimora Police Station wherein the names of the appellants were mentioned as the assailants.

(ix) Both the appellants were known to the prosecution witnesses as they are residents of the same locality and hence there was no question of mistaken identity.

(x) The important witnesses examined by the prosecution, though closely related to the deceased, will not falsely involve the accused in the case by letting off the real culprits.

(xi) There was motive behind commission of the murder by the appellants as they suspected that the deceased and his wife Naniben were responsible for the rift between their parents and the deceased and his wife Naniben had played a major

role in helping their mother to run away from the matrimonial home.

(xii) Prosecution has proved beyond reasonable doubt that accused no.2 had caught hold of the deceased and accused no.1 had inflicted knife blow in the abdominal part which resulted into death of the deceased.

7. On the basis of the above referred to conclusions, the learned Sessions Judge convicted appellant no.1 under S.302, and appellant no.2 under S.302 read with S.114 of I.P.Code, and sentenced both of them to undergo R.I. for life, which has given rise to filing of the present appeal by the appellants.

8. Learned Counsel for the appellants Mr.KB Anandjiwala, has taken us through the entire evidence on record, and has submitted that the FIR Ex. 15 was ante-time because as per the evidence of PW 1 Naniben, she was called at the police station around 11.0 p.m. to lodge her complaint. It is argued by the learned Counsel for the appellants that the solitary eye-witness Himmat could not have witnessed the occurrence. It is further pleaded by the learned Counsel for the appellants that there are many improvements and contradictions in the evidence of Himmat and other witnesses which create doubt about the involvement of the appellants in the commission of crime. It is the submission of the learned Counsel for the appellants that the prosecution witnesses Kankuben, Jagubhai and Rameshbhai have deposed about the deceased having made oral dying declaration whereas there is not even a whisper about the same in the oral evidence of PW 1 Naniben and eye-witness Himmat with regard to the deceased having made oral dying declaration in their presence. It is the submission of the learned Counsel for the appellants that the theory of oral dying declaration is subsequently got up by the prosecution witnesses just to create evidence against the appellants. The learned Counsel for the appellants has also argued that Gaekwad Mill Chawl is situated about 400 to 500 ft. away from the place of occurrence and therefore, it was not possible for Naniben to hear the shouts of Himmat. The learned Counsel for the appellants has argued that the evidence of the prosecution witnesses does not inspire confidence as there are many contradictions and improvements and as they have falsely implicated the appellants in the case, the appeal should be allowed and the conviction should be set aside.

9. On the other hand, learned APP Mr.ST Mehta has

tried to support the reasoning and conclusions of the learned Sessions Judge and has argued that no error is committed by the learned Sessions Judge in placing reliance on the evidence of eye-witness Himmat and informant Naniben. It is further submitted by the learned APP that the appellants had a motive to commit the murder of the deceased as they suspected that the deceased and his wife were instrumental and were responsible in helping the mother of the appellants to run away from her matrimonial home. The learned APP also pleaded that FIR Ex. 15 was filed at the earliest point of time within 3 hours of the occurrence of the incident, wherein the names of both the appellants were mentioned as the assailants. It is further argued by the learned APP that the contradictions and improvements pointed out by the learned Counsel for the appellants do not destroy the evidence of the prosecution witnesses and therefore, the appeal should be dismissed.

10. The incident had taken place on 6.10.1987 around l7.0 hours near the public lavatory situated in the locality of Gaekwad mill. According to the evidence of PW 1 Naniben, the deceased had taken tea around 4.30 p.m. or 4.45 p.m., and had gone to answer the call of nature. As per her evidence, she had called her son Himmat and had given him money to buy edible oil. It is her version that she was going with pots alongwith her sister-in-law Kankuben to draw water from the public water-tap. As per her evidence, when she was about to go to the water-tap she heard the shouts of her son Himmat that appellant no.2 had inflicted knife blow to the deceased. She has emphasised that she alongwith her sister-in-law Kankuben went towards the place of incident and saw that the two appellants were running away from that place. She has deposed that she had taken out the sari of Kankuben and had tied it on the wound of the deceased and had asked her son Himmat to call autorickshaw. It is her case that after arrival of autorickshaw, she and Kankuben alongwith the deceased had gone to the hospital, where the deceased was declared dead after 10 to 15 minutes of their reaching the hospital. She has emphasised that a policeman had come to the hospital and she had lodged the complaint. In cross-examination, Naniben deposed that after the death of her husband, she had become unconscious and she was taken to her house and after some time police had come to call her. It is deposed by her that when she returned to her house as she was mentally disturbed, her son Himmat was accompanying her. She emphatically stated that Himmat and Kankuben were not questioned by police in the hospital or at her house. Her evidence in cross-examination shows that she

alongwith Kankuben and Himmat had gone to the police station at 9.00 P.M. and after one hour of reaching the police station, her statement was recorded. The evidence of Naniben, if closely scrutinised shows that her F.I.R. was not recorded at the hospital or at the police station, as is tried to be shown by the prosecution. F.I.R Ex.15 shows that it was recorded at about l9.0 hours. Evidence of Naniben on the contrary indicates that the FIR was lodged after l0.0 p.m. at the police station when police had come to her house to call her to the police station. It is pertinent to note that Naniben during cross-examination, has admitted that Billimora Municipality supplies water through public water taps in the evening from 7.0 P.M. to 12.0 midnight and in the morning from 7.0 A.M. to 12.00 noon. Therefore, the evidence of Naniben that at 5.0 p.m., she had gone to fetch water from the water tap belies her version. In our opinion the oral testimony of Naniben does not inspire confidence as she has tried to improve her version just to show that she heard the shouts of Himmat and reached the place of incident immediately.

11. PW 2 Kankuben, in her examination-in-chief deposed that she alongwith Naniben reached the place of incident within two minutes after hearing shouts of Himmat. She deposed that after they reached the place of incident, Jagubhai Nathubhai came there and asked the deceased as to who had inflicted the knife blow. According to her version, the deceased replied that "Arvind Ramji (i.e. appellant no.1) had inflicted knife blow". It is pertinent to note that the name of appellant no.2 does not figure in this oral dying declaration made by the deceased.Witness Kankuben has emphasised that around 9.0 p.m. police had come to call Himmat and Naniben and had taken them to police station. It is her evidence that she was also taken to police station and her statement was recorded at the police station. She has deposed that they had returned around l.30 a.m. from the police station. In cross-examination Kankuben admitted that when police had come to call them, they had reached the police station at ll.0 p.m. and they were made to sit for one hour and thereafter police had started recording their statements. She emphasised that after recording the statements of herself, Himmat and Naniben, police had taken thumb impression of Naniben on her statement. Evidence of Kankuben shows that the statement of Naniben was recorded after ll.0 p.m. on 6.10.1987 at the police station. The witness had all throughout accompanied Naniben and Himmat right from the place of incident to the hospital, back to the house of Naniben and thereafter also she had accompanied Naniben

and Himmat to the Police Station. Evidence of this witness does not suggest that FIR Ex.15 was recorded at l9.0 hours as alleged by the prosecution.

12. PW 3 Himmat Keshavbhai has deposed in his examination-in-chief that after the death of his father, he alongwith his mother returned to his house. It is deposed by him that around 8.30 p.m. or 8.45 p.m. his uncle had come to call them, and had taken them to police station. It is emphatically stated by him that in the police station, they were interrogated and police had recorded the FIR and they had returned to their house at l.30 a.m.

13. The submission of the learned Counsel for the appellants that the FIR is ante-timed has got great force. The oral evidence of Naniben, Kankuben and Himmat as discussed above, shows beyond any pale of doubt that Naniben had not lodged the FIR at l9.0 hours either at the hospital or at the police station. As per the evidence of Naniben, she had become unconscious after the death of her husband, and she returned home alongwith Himmat and Kankuben. As no FIR was lodged before police, the police had come to call them at the house at about 9.0 p.m. If the evidence of all these three witnesses is read together, it is evident that the FIR came to be lodged around ll.0 p.m. at Billimora police station. In this connection, it is also necessary to refer to the evidence of Dr.Dalal who treated the deceased at Mangusi Hospital, Billimora. Dr.Dalal in his cross-examination deposed that when he asked the persons who accompanied the deceased about the cause of assault, they used the word "maramari" (scuffle). Thus, the evidence of prosecution witnesses as discussed above, shows that the FIR was lodged after l0.0 p.m. at Billimora Police Station, and not at l9.00 hours as stated in the FIR, Ex.15. This shows that at the earliest point of time, the names of the appellants were not known to the witnesses as assailants who were responsible for causing murder of the deceased. If Himmat had witnessed the occurrence of the incident and Naniben had seen the appellants running away from the place of incident, then there was no reason why any of them did not lodge the complaint at the earliest point of time before the investigating agency. Even when Dr.Dalal asked about the reason of the injury, they only disclosed that it was due to "maramari" (scuffle). The conduct of the prosecution witnesses in not disclosing the names of the appellants as the assailants at the earliest point of time raises doubt that the names of the appellants were given after due deliberation amongst the relatives of the deceased.

14. The argument of the learned Counsel for the appellants that it was not possible for Himmat PW 3 to have witnessed the occurrence of the incident has great force. As per the evidence of Himmat, when he was near one culvert which was situated just opposite the lavatories, he saw that the appellants had hidden behind the wall and as soon as the deceased came out of the lavatory, appellant no.2 came from behind and caught hold of the deceased and appellant no.1 inflicted knife blow on the abdominal part of the deceased. It is worth-noticing that in the map of the scene of offence, and in the panchnama of the scene of offence, no culvert is shown situated just opposite to the lavatories. Furthermore, at the back of the place of incident, there was a wall and in front of the lavatories also there was a wall which made it impossible for eye-witness Himmat to see the occurrence. If the evidence of witness Himmat is read closely, it does not show as to from which direction he had come and in which direction he was proceeding to buy edible oil. If the evidence of Himmat is closely scrutinised, there are many improvements made by him in his oral testimony as compared to his statement before police. In cross-examination, he admitted that from the culvert where he was standing, there was a distance of more than one furlong between the culvert and his house. He also admitted that the place of incident is surrounded by many chawls. He deposed that the culvert was situated on the northern side of the lavatories at a distance of 150 feet. If we refer to the map prepared by the Circle Inspector, the wall is shown just behind the lavatories in the northern direction. If witness Himmat was standing near the culvert which was situated on the northern side, then he could not have witnessed the incident. It is also pertinent to note that Himmat had not stated in his statement before police that accused no.l after inflicting knife blow on the deceased had run away towards Mohalla, and accused no.2 had run away towards hillock. He admitted that before police, he had not stated that accused no.1 had thrown his knife near the place of incident. The evidence of witness Himmat shows that he has a tendency to improve his version. His deposition before the court shows that there is all the possibility that the present appellants are falsely implicated in this case as the assailants after due deliberations. There are many major contradictions in the evidence of this eye-witness, which create doubt in our mind with regard to his presence at the place of incident. The fact that he had not disclosed the names of the appellants before police who had immediately come at the hospital also raises doubt in our mind that he

knew that the appellants were the persons who had inflicted knife blow on the deceased. In our opinion, the learned Sessions Judge has erred in placing implicit reliance on the testimony of Himmat who poses himself as eye-witness to the incident.

15. The learned Sessions Judge has also believed that the deceased had made an oral dying declaration before PW 2 Kankuben, PW 6 Jagubhai and PW 8 Ramesh who is the brother of the deceased. It is worth-mentioning that as soon as knife injury was inflicted by appellant no.1, Himmat raised shouts and went near the deceased who had fallen down near the lavatories. Naniben and Kankuben had also arrived near the deceased within 2 to 3 minutes. It is brought out in the evidence of Naniben as well as Himmat that both of them were in the close vicinity of the deceased. All the three witnesses who have deposed about the oral dying declaration have in categorical terms stated that when the deceased was lying near the lavatories in injured condition he had narrated about the occurrence of the incident and at that time Naniben and Himmat were near the deceased. However, neither Naniben nor Himmat mentioned about the deceased having made any statement that appellant no.2 had caught hold of him and appellant no.1 had inflicted knife injury to him. It is only through the evidence of Kankuben, Jagubhai and Rameshbhai, that the prosecution has tried to advance the theory of oral dying declaration made by the deceased to the above three witnesses. If the oral dying declaration was made by the deceased, then it would have been heard by his wife Naniben and his son Himmat. It is pertinent to note that PW 2 Kankuben deposed that the deceased stated that accused no.1 had inflicted the knife injury. She in her deposition did not refer to the name of accused no.2 involving him in the assault. Therefore, there is variance in the evidence of Kankuben when compared with the evidence of Jagubhai and Ramesh, with regard to the actual words spoken by the deceased about his assailants.

16. It is settled legal principle that in order to be acted upon, the evidence with regard to an oral dying declaration should be subjected to strictest and closest circumstances. Where the oral dying declaration is found true and gets corroboration from material particulars available on record it can form the basis of conviction of an accused. Where dying declaration is oral and recorded, and is found true and trustworthy, it can form the basis of conviction. A dying declaration recorded by a Magistrate carries much weight, as it stands on a much higher footing than a dying declaration dependent upon

oral testimony, which is fallible to all the infirmities of human memory. An oral dying declaration alleged to have been made by the deceased, should be scrutinised cautiously. The witnesses have not given unassailable evidence with regard to the oral dying declaration. Non-mention about oral dying declaration in the first information report is relevant. There is distortion, infirmity and embellishment in the evidence of the witnesses, regarding oral dying declaration alleged to have been made by deceased and therefore, it is not reliable. The accused cannot be convicted on the basis of oral dying declaration when it creates a doubt.

17. In the case of DARSHANA DEVI vs. STATE OF PUNJAB, 1996 SCC (Cri.), 38, the Supreme Court had an occasion to deal with the evidentiary value of oral dying declaration made by the deceased. In that case, the Supreme Court after appreciating the evidence on record, in para 10 of the report, held as under :-

> "There is variance in the statements of the two witnesses with regard to the exact words allegedly used by the deceased. According to PW 2, the deceased had stated that the appellant had sprinkled kerosene on him when he was lying asleep and had burnt him, while Lachhmi Devi, PW 1 did not attribute any such statement to the deceased. PW 1 reiterated in her cross-examination "all that Madan Lal told me was that he had been burnt by Darshana Devi by sprinkling kerosene". Even though an oral dying declaration can form basis of conviction in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important. The difference in the exact words of the declaration in this case detract materially from the value of the oral dying declaration."

18. In the light of the above settled legal principle with regard to oral dying declaration, in our opinion, there is variance in the evidence of prosecution witnesses who were in close vicinity of the deceased. Witnesses Naniben and Himmat did not utter a word about the deceased having made the oral dying declaration before them. There is variance in the evidence of Kankuben when compared with the evidence of Jagubhai and Ramesh, with regard to (l) the actual words spoken by the deceased, (2) the names of the assailants, and (3) the

manner in which he was assaulted. Therefore, in our opinion, no reliance can be placed on the evidence adduced to establish oral dying declaration alleged to have been made by the deceased before three witnesses, viz. Kankuben, Jagubhai and Ramesh. It would not be out of place to state that these three witnesses have got a tendency to implicate the appellants by advancing a theory about the deceased having made oral dying declaration before them. In our view, no reliance can be made on such oral dying declaration, which creates doubt. Therefore, the learned Sessions Judge has erred in relying on this piece of evidence in convicting the appellants.

19. As discussed in the foregoing paragraphs, in the evidence of Naniben, Himmat and Kankuben, there are many improvements, contradictions and variance when compared with their statements before police. The FIR was lodged after about 6 hours after the occurrence of the incident which shows that after due deliberations, it was filed implicating the appellants. The witnesses, as discussed above, had full opportunity to mention the names of the assailants before police who had arrived at the hospital and thoroughly interrogated them. That opportunity was also available before Dr.Dalal who had treated the deceased. It is an admitted fact that the appellants were known to the witnesses examined by the prosecution with regard to the incident. The witnesses had all the opportunity to disclose the names of the appellants as the assailants of the deceased, at the earliest point of time. Evidence of Naniben is full of contradictions. Her version that she had gone alongwith Kankuben to fetch water from the water-tap is proved to be false as it was not the time when the Municipality supplied water. It is also pertinent to note that Naniben in her FIR Ex.15 has tried to show herself as an eye-witness to the incident, but surprisingly enough in her evidence before court, she has not claimed to be an eye-witness. Before court she only deposed that she had seen the accused running away. In paragraph 4 of her evidence, Naniben has stated that two months prior to the incident, accused no.2 had caused injury on her hand and therefore, she had lodged a complaint against him before police. The incident of causing injury to Naniben had taken place after the mother of the appellants had run away from her matrimonial home. Because of this suspicion in the mind of Naniben, it appears that the appellants have been falsely implicated in the present case.

20. It is the prosecution case that on hearing the shouts of Himmat, PW 1 Naniben had reached near the place

of incident alongwith Kankuben. In this connection, if reference is made to the oral evidence of Himmat, in paragraph 6 of his cross-examination, he has admitted in clear terms that shouts raised by him, near the culvert could not have been heard at his residence. This clear admission on the part of witness Himmat also creates doubt in our mind that his shouts were heard by Naniben, who was, at the relevant time at her house, and not on her way to fetch water from the water-tap. Evidence of Himmat also raises a serious doubt in our mind, more particularly, about his presence near the place of the incident. The contradictions and improvements brought out in his evidence shows his unnatural conduct. In our opinion, there is not a single piece of evidence, which can be called reliable and on the basis of which conviction against the appellants can be sustained.

21. As a result of the foregoing discussion, the appeal filed by the appellants deserves to be allowed. The appeal is accordingly allowed. The impugned judgment and order dated 21.9.1989, passed by the learned Sessions Judge, Valsad at Navsari in Sessions Case No. 9 of l988, convicting appellant no.1 under S.302 of I.P.Code and appellant no.2 under S.302 read with S.114 of I.P.Code and sentencing both of them to undergo imprisonment for life is quashed and set aside. The appellants are in jail, and therefore, the jail authorities are directed to set them at liberty forthwith if their presence in jail is not required in connection with any other case. Muddamal articles be disposed of in terms of the directions given by the learned Sessions Judge in the impugned judgment.

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abraham.